

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANA F. KETTERMAN

Claimant

V.

WALMART SUPERCENTER

Respondent

AND

AMERICAN HOME ASSURANCE COMPANY

Insurance Carrier

Docket No. 1,033,923

ORDER

Respondent and its insurance carrier (respondent) appealed the July 29, 2016, Post-Award Medical Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. John M. Ostrowski of Topeka, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent.

RECORD

The record considered by the Board is listed in the Post-Award Medical Award.

ISSUE

Claimant suffered a back injury on October 24, 2006. She settled her claim on February 2, 2012, in a lump sum with medical treatment left open. On September 17, 2015, claimant filed an Application for Post Award Medical, requesting home health care.

The ALJ granted claimant's request for medical treatment. Respondent appeals, contending claimant's personal health conditions, not her work injuries, cause her need for home health care. Claimant asks the Board to affirm the July 29, 2016, Post-Award Medical Award. The sole issue is whether claimant's work injury caused her need for home health care.

FINDINGS OF FACT

Claimant, age 64, underwent two surgeries for her low back injury. She testified a metal rod was inserted in her back during the first surgery. During her second surgery, which was in 2009, claimant had cement placed around several vertebrae. Since her second surgery, claimant suffers from severe pain. She uses Flector and Fentanyl pain patches, takes Lortab, uses a heating pad and spends most of her day lying flat in a bed or recliner. Claimant indicated she is functional two days a week.

Because of her back condition, claimant had not driven a vehicle for eight months to one year prior to being deposed in April 2016. On a good day, she can stand one and one-half to two hours and on a bad day, one-half hour. She is unable to perform housework, cook, do laundry or yard work. Claimant testified she is able to walk very little without assistance and uses a cane or walker. Cynthia Hake, who is married to claimant's nephew, works during the day and cares for claimant at night and does almost everything for her, including housework and cooking meals. Claimant's son works at night and takes claimant to the doctor, does her yard work, takes out her trash and takes her shopping. In the past year, claimant's dependency on her son and Ms. Hake has increased.

In addition to her back condition, claimant has several health issues. She has a heart condition and had to take nitroglycerin twice in three to five months, but takes no other medications for her heart. Claimant testified her heart condition did not restrict her activities. She sees a cardiologist once a year for a checkup. Claimant had stomach ulcers, but now takes only over-the-counter Zantac. Her stomach condition has worsened because of difficulty accepting that she can no longer do what she used to because of her back.

Claimant uses an inhaler daily for chronic obstructive pulmonary disease (COPD) and takes medication for high blood pressure and migraine headaches. She currently smokes five cigarettes a day and has smoked for 45 years. Her COPD and high blood pressure did not restrict her activities. Claimant's migraine headaches, which she has once or twice every six to eight months, can make her dysfunctional from a few hours to 48 hours. She has a thyroid condition that causes weight loss. Claimant's normal weight should be 110 pounds and she weighs 77 pounds. Claimant also gets urinary tract infections (UTIs) every four to six months, but denied they caused her pain. Claimant has kidney stones, but has not had to seek treatment for them in the past year. In 2016, claimant was hospitalized for three days for influenza, but was not otherwise hospitalized in 2016 or 2015. Claimant went to the emergency room several times for her migraines in 2015 and 2016 and for her back in 2015.

Claimant acknowledged having several other past medical issues, including depression, cervical cancer when she was 27 or 28, a hysterectomy and surgical removal of part of her stomach when she was 23. Claimant explained that she was diagnosed with

depression in the past year and after taking half of her prescribed medication, quit taking it because she began coping.

Ms. Hake testified she has been in contact with claimant from the time of her 2006 work accident and the contact has been daily for a long period of time. Ms. Hake, her husband and claimant's son assist caring for claimant. Ms. Hake indicated claimant's ability to perform activities of daily living has progressively worsened because of her back condition. Claimant's dependency on Ms. Hake has increased over time. Claimant cannot mow or vacuum, struggles with cooking and cannot do laundry. Claimant has difficulty getting out of bed and standing for long periods hurts her back. Ms. Hake shops, cooks, cleans, takes out trash and does laundry for claimant. Claimant does not drive and must use an assistive device when walking. Ms. Hake puts on claimant's pain patches, because claimant cannot turn to put them on her shoulders. Claimant stays with Ms. Hake a few days every week because she cannot care for herself. Ms. Hake estimated claimant spends the night at her (claimant's) home 80 percent of the time and the remainder of the time at Ms. Hake's home.

Ms. Hake acknowledged she helps claimant when she has health issues unrelated to her back condition. Ms. Hake testified claimant has never complained of pain because of having UTIs. According to Ms. Hake, claimant had two or three migraine headaches in the past three months.

Daniel J. Garlow, M.D., a family practitioner, has worked at the Family Care Center in Concordia for the past two years. He first saw claimant in the clinic on November 9, 2015, and has been her primary care physician since then. Dr. Garlow primarily sees claimant for her low back condition, but also treats her overall condition. The doctor indicated claimant had failed back syndrome and chronic pain syndrome. Dr. Garlow testified claimant has significant pain and dysfunction, primarily due to her low back. The doctor testified claimant's use of a cane or walker, that she no longer drives a vehicle, has several days per week when she is dysfunctional, has difficulty kneeling, bending, standing, sitting, walking and lying down for long periods of time are all consistent with her back condition.

Dr. Garlow agreed with the recommendation that claimant should receive home health care. He opined claimant's need for home health care was primarily caused by her low back condition. Dr. Garlow confirmed claimant's non-back issues have worsened. The doctor indicated claimant's cardiovascular issues are well controlled. Dr. Garlow acknowledged smoking, migraine headaches and lack of sleep can contribute to chronic pain syndrome. The doctor also indicated claimant's COPD could contribute to how claimant feels overall and that coronary artery disease can cause fatigue. He believed claimant's smoking and COPD had a minimal contribution to her need for home health care. Dr. Garlow testified:

I think her other chronic medical problems right now, if it weren't for the pain, would not necessitate home health in her current situation. But if she had progressive worsening COPD, or other, it could be *[sic]* get to the point where those would need home health, but right now she doesn't need home health because of her COPD, or her other chronic medical problems.¹

At respondent's request, orthopedic surgeon Michael J. Johnson, M.D., evaluated claimant on January 8, 2016. Claimant told the doctor that her back was her major problem and there were days when she could not get out of bed, could not stand long, could not walk and had difficulty with bending and prolonged sitting. Dr. Johnson noted claimant underwent back surgery in 2008 to remove bone and soft tissue and for a fusion involving a bone graft. A second back surgery involving a laminectomy and fusion was performed in 2009. The doctor noted claimant has pseudoarthrosis, or a nonunion, at L3-4 that has been present for many years. Dr. Johnson believed claimant's back has not structurally or anatomically changed, but her subjective symptoms have increased. The doctor indicated smoking decreases the chances of a successful fusion and could cause issues with bone graft healing.

Dr. Johnson noted claimant has 14 co-morbid medical issues, none of which are trivial, in addition to her low back condition:

1. History of acute myocardial infarction
2. Coronary artery disease
3. Heart disease
4. History of gastroesophageal reflux disease (GERD)
5. History of ulcers
6. Hyperthyroidism
7. History of cervical cancer
8. Hysterectomy
9. History of partial gastrectomy in 1987
10. Depression
11. Migraine headaches
12. History of UTIs
13. Tobacco usage
14. Arthritis.

Dr. Johnson noted claimant took 13 medications and the majority were for medical issues other than her back condition. Dr. Johnson detailed the major side effects of the medications claimant was taking for her co-morbid issues. The doctor admitted that he assumed claimant was having side effects from her medications.

¹ Garlow Depo. at 18-19.

Dr. Johnson opined claimant is a candidate for home health care. According to Dr. Johnson, claimant's co-morbid conditions were a factor in her poor outcome and general deconditioning. The doctor apportioned 40 percent of claimant's need for home health care to her low back condition and 60 percent to her other medical issues. Dr. Johnson testified his apportionment was a "rough guesstimate"² and could vary. He could not "give an exact number for each specific diagnosis within that 60 percent."³ The doctor indicated that if claimant had only her current back condition, she would not need home health care and if she had only her 14 co-morbid medical issues, she would not need home health care. He indicated it was the combination of all her health issues that caused her need for home health care.

Dr. Johnson admitted not knowing when claimant's depression diagnosis was made and assumed she was still being treated for depression and depression was affecting her life. Dr. Johnson acknowledged that if claimant was not currently having a UTI, then that condition was not affecting her life. The doctor indicated claimant was fragile, but did not know if she was fragile when she underwent her back surgeries. He did not know if claimant's heart condition was stable. He did not know how often claimant took nitroglycerin and assumed that if she was doing well with her heart, she would not be on medication. He explained he listed claimant's partial gastrectomy because it can impact a person's general health and fragility.

Dr. Johnson did not know the frequency of claimant's migraine headaches, but assumed it was a current issue because she was taking medication. Nor did Dr. Johnson know how often claimant had GERD. Even if claimant had not had GERD symptoms in the last five years, the doctor said she had the condition because she was taking medication for it. Dr. Johnson admitted not knowing how often claimant used her inhaler. The doctor acknowledged he did not review the testimony of claimant or Ms. Hake. Nor did he discuss claimant's condition with Dr. Garlow.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a), in part, states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

Every witness who testified, including Drs. Garlow and Johnson, expressed that claimant needs home health care. Three witnesses – claimant, Ms. Hake and Dr. Garlow –

² Johnson Depo. at 30.

³ *Id.* at 31.

indicated that claimant's back condition caused her need for home health care. The Board finds those witnesses more credible than Dr. Johnson.

Dr. Garlow, who is more familiar with claimant's physical condition and maladies than Dr. Johnson, testified claimant does not need home health care because of her non-work medical issues. He indicated claimant's heart condition was well controlled. The doctor indicated claimant's smoking and COPD had a minimal effect on her need for home health care.

Ms. Hake, who sees claimant daily, indicated claimant needed home health care because of her back condition. Claimant cited her pain and physical limitations caused by her back injury as the reason she needed home health care. Claimant testified, and Ms. Hake confirmed, that she did not have pain as a result of her UTIs. Claimant's COPD, GERD, heart condition and other non-work medical issues are under control and minimally contribute to her need for home health care. Claimant has hyperthyroidism and her low weight is a concern. However, there is insignificant evidence hyperthyroidism and her low weight are a major factor for her needing home health care.

Dr. Johnson saw claimant only one time. He largely ignored claimant's complaints of back symptoms, as well as the effects said symptoms had on her activities of daily living. He apparently was not aware that family members took care of many of claimant's basic needs because of her back symptoms. The doctor made several assumptions concerning claimant's co-morbid medical conditions, yet he: (1) did not know the frequency of her migraine headaches, (2) assumed she was currently being treated for depression and (3) did not know how often she had GERD.

Dr. Johnson "guesstimated" 60 percent of the reason claimant needed home health care was her non-work medical issues. Some of the co-morbid medical issues he noted were a 1987 partial gastrectomy, ulcers that claimant no longer had, a hysterectomy and cervical cancer, which she had many years earlier. Simply put, Dr. Johnson's opinion apportioning 40 percent of claimant's need for home health care to her low back condition and 60 percent to her other medical issues is flawed.

CONCLUSION

Claimant sustained her burden that her work injury caused her need for home health care.

WHEREFORE, the Board affirms the July 29, 2016, Post-Award Medical Award entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of October, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
jmostrowski53@gmail.com; karennewmann@mcwala.com

Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
mkauphusman@wallacesaunders.com

Honorable Bruce E. Moore, Administrative Law Judge